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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	78579524
Applicant	Fleetwood Enterprises, Inc.
Applied for Mark	ROYALE
Correspondence Address	EDWARD M. PRINCE ALSTON & BIRD LLP THE ATLANTIC BLDG. , 950 F STREET, NW WASHINGTON, DC 20004-1404 UNITED STATES edward.prince@alston.com
Submission	Appeal Brief
Attachments	Applicant's Appeal Brief (ROYALE).pdf (15 pages)(558405 bytes)
Filer's Name	Edward M. Prince
Filer's e-mail	edward.prince@alston.com
Signature	/Edward M. Prince/
Date	04/27/2007

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Applicant:	Fleetwood Enterprises, Inc.	)	
		)	
Serial No.	78/579,524	)	Examining Attorney:
		)	Paula B. Mays
Filed:	March 3, 2005	)	
		)	Law Office 102
Mark:	ROYALE	)	
		)	
Our Ref.	040401/289107	)	
			Date: April 27, 2007

APPLICANT'S APPEAL BRIEF

Commissioner for Trademarks
Box TTAB
P.O. Box 1451
Alexandria, Virginia 22313-1451

Madam:

This is an appeal from a final rejection. The only issue is likelihood of confusion under Section 2(d). Applicant seeks to register the mark ROYALE for folding camping trailers. The application has been finally rejected on the grounds of likelihood of confusion with respect to the mark ROYAL CARGO for trailers and transportation equipment, namely, stock trailers, horse trailers, utility trailers, flatdeck trailers, truck decks, enclosed cargo trailers for the transportation of snowmobiles, automobiles and other equipment, and cargo trailers.

BACKGROUND OF THE ACTION

In the office action of September 26, 2005, the subject application was initially rejected on the grounds of likelihood of confusion with respect to three marks, namely:

Reg. No.	Mark	Goods
1,562,070	ROYALE	Motor vehicles; namely, automobiles, engines therefor, and structural parts thereof
2,140,117	ROYAL	Truck bodies for on road vehicles
2,917,194	ROYAL CARGO	Trailers and transportation equipment, namely, stock trailers, horse trailers, utility trailers, flatdeck trailers, truck decks, enclosed cargo trailers for the transportation of snowmobiles, automobiles and other equipment, and cargo trailers

As discussed hereinafter, the mark being cited against applicant's mark, namely, ROYAL CARGO, was allowed over the other two cited registrations.

In analyzing the issue of likelihood of confusion, the examiner first discussed the similarity of the marks and then the similarity of the goods. As to the marks, the examining attorney stated that the General Motors mark ROYALE "is identical to applicant's mark ROYALE." As to the mark owned by Royal Truck Bodies, the examining attorney stated:

> ROYAL is also highly similar to the applicant's mark. The only difference is that the applicant has added an "E" to its mark. Slight differences in the sound of similar marks will not avoid a likelihood of confusion.

Finally, as to the currently cited mark ROYAL CARGO, the examining attorney stated:

> The sound, commercial meaning and impression of the marks are closely related. In particular, the dominant portion of the registrant, South End Trailer Corp's mark: ROYAL CARGO is the same as the applicant's mark: ROYALE. The marks are compared in their entireties under a Section 2(d) analysis. Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion.

Turning to the goods, the examining attorney noted that the applicant's goods were folding camping trailers. In a convenient generalization, the examining attorney then stated that "the registrants offer very similar goods in the nature of vehicles."

In a response filed on March 3, 2006, applicant pointed out the weaknesses of the marks, the fact that the three cited registrations were allowed over each other, and particularly the differences in the goods. These points are repeated in detail below in the argument section.

In the office action of May 1, 2006, the examining attorney considered applicant's response and withdrew the rejection on the basis of Reg. Nos. 1,562,070 and 2,140,117. However, the examining attorney continued the rejection on the basis of likelihood of confusion with respect to Reg. No. 2,917,194. The examining attorney contended that the sound, commercial meaning and impression of the marks "are very closely related." The examining attorney further argued that the "points of similarity are of greater importance than the points of difference." Disregarding the word "CARGO" in this analysis because it was descriptive and disclaimed, the examining attorney argued, "the dominant term of the registrant's mark, the term most likely to be remembered by

consumers is the same as the applicant's mark in sound, commercial impression, and meaning." In the first office action when the applicant's mark was compared to the mark ROYAL of Royal Truck Bodies, the examining attorney contended that the marks were only "highly similar" and that "slight differences in the sound of similar marks will not avoid a likelihood of confusion." Now, some eight months later, the examining attorney is contending that the words "ROYALE" and "ROYAL" are "the same . . . in sound, commercial impression, and meaning." Of course, this is the wrong comparison because the cited mark is not ROYAL but rather ROYAL CARGO, a term which has no similarity in sound, commercial impression or meaning with respect to applicant's mark.

As to the goods, the examining attorney claimed that printouts attached to the second office action had "probative value to the extent that they serve to suggest that the goods listed therein, namely trailers, are of a kind emanating from a single source."

Applicant filed a request for reconsideration, the arguments of which form the basis of the applicant's argument below. The examining attorney contended that applicant's request for reconsideration raised no new issue and offered no new compelling evidence with regard to the issue raised in the final action. Therefore, the request for reconsideration was denied, and this appeal resumed.

ARGUMENT

The only issue in the case is the rejection of this application under Section 2(d) on the grounds of likelihood of confusion with respect to Reg. No. 2,917,194 for the mark ROYAL CARGO for trailers and transportation equipment, namely, stock trailers, horse trailers, utility trailers, flatdeck trailers, truck decks, enclosed cargo trailers for the transportation of snowmobiles, automobiles and other equipment, and cargo trailers. Relying upon the case of In re E.I. du Pont de Nemours & Co., 177 USPQ 563, 567 (CCPA 1973), the examining attorney concludes in the office action of May 1, 2006, that the issue of likelihood of confusion must be analyzed in two steps. First, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression, and, second, the examining attorney must compare the goods or services to determine if they are related. It is submitted that there are other factors, one of which was previously discussed in applicant's prior response, that also need to be considered. These factors are:

> The number and nature of similar marks in use on similar goods, and
>
> The conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing. TMEP § 1207.01

Nevertheless, these two additional factors are directly related to the two issues discussed by the examining attorney - namely, the similarity of the marks and the similarity of the goods.

1. **Weakness of the Marks**

In analyzing the similarity of the marks, the examining attorney did not consider the weakness of the mark ROYALE and of the alleged dominant portion of the cited reference ROYAL. The records of the Trademark Office show that there are 597 ROYALE marks of which 189 are alive. There are 4,773 ROYAL marks of which 1,787 are alive. See Exhibit A to the Request for Reconsideration. Obviously, both the mark ROYAL and the mark ROYALE are extremely weak.

The Trademark Office has been consistent in finding no likelihood of confusion between the marks ROYALE and ROYAL when used for the same goods as illustrated by the following registrations (Exhibit B to the Request for Reconsideration):

Mark/Goods	**Mark/Goods**
ROYALE, for cookies Reg. No. 1,321,039	ROYAL, for cookies Reg. No. 652,140
ROYALÉ, for watches Reg. No. 1,360,438	ROYAL, for watch movements Reg. No. 29,434
ROYALE, for playing cards Reg. No. 360,030	ROYALS, for playing cards Reg. No. 1,607,457
ROYALE, for retail store in the field of photographic equipment and photographic film processing services Reg. No. 1,159,458	ROYAL, for photographic paper Reg. No. 1,707,629
ROYALE, for kitchen cabinets Reg. No. 1,197,928	ROYAL, for cabinets Reg. No. 592,199

Mark/Goods	Mark/Goods
ROYALE, for toilet paper and paper towels Reg. No. 1,212,386	ROYAL, for toilet tissue and paper towels Reg. No. 1,602,177
ROYALE, for transportation by air of persons Reg. No. 1,444,494	ROYAL, for transportation by air of persons Reg. No. 1,928,835

While the goods are not identical, the Trademark Office found no likelihood of confusion between the two cited marks ROYALE for motor vehicles, namely, automobiles, engines therefor and structural parts thereof, Reg. No. 1,562,070, and ROYAL for truck bodies for on road vehicles, Reg. No. 2,140,117. It is obvious that the Trademark Office found no confusion between these two marks and the mark CARGO CARRIER, for trailers and transportation equipment, Reg. No. 2,917,194, because the marks must be viewed in their entireties.

2. The Marks, Viewed in Their Entireties, Are Sufficiently Different in Sound, Appearance and Connotation to Avoid Likelihood of Confusion

The examining attorney simply disregards the word "CARGO" on the grounds that it is descriptive and disclaimed. It is appreciated that the examining attorney says that a disclaimed portion "certainly cannot be ignored," but then the examining attorney proceeds to ignore the word completely and concludes that the dominant term of registrant's mark is "the same as the applicant's mark in sound, commercial impression and meaning." Obviously, this statement is in error because even the examining attorney had previously admitted in the first

office action, p. 2, that ROYALE and ROYAL do not have the same sound. Clearly, the commercial impression and meaning of one word in a mark is irrelevant when the commercial impression and meaning of the mark viewed in its entirety is totally different from applicant's mark.

The mere fact that marks share elements, even dominant elements, does not compel a conclusion of likelihood of confusion. General Mills, Inc. v. Kellogg Co., 3 USPQ2d 1442, 1445 (8th Cir. 1997). Kirkpatrick, Likelihood of Confusion in Trademark Law, § 4.10.A. Here the marks do not even share the same element. Where a common portion is weak, even minor differences between marks will suffice to enable consumers to differentiate between them. Kirkpatrick, Likelihood of Confusion in Trademark law, § 4.10.A. Consider, for instance, the following cases recited in Kirkpatrick, § 4.10.A, where no likelihood of confusion was found even though the entirety of one mark was incorporated in the other and the goods/services were identical (which is not even the case here):

Mark	**Case**
SILK 'N SATIN v. SILK, both for cosmetics.	Pacquin-Lester Co. v. Charmaceuticals, Inc., 179 USPQ 45 (CCPA 1973)
SILK v. SILKSTICK, both for cosmetics.	Melaro v. Pfizer, Inc., 214 USPQ 645, 648 (TTAB 1982)
BOND-PLUS v. WONDER BOND PLUS, both for industrial adhesives.	Industrial Adhesive Co. v. Borden, Inc., 218 USPQ 945, 951-52 (TTAB 1983)

Mark	Case
ALPHA v. ALPHA STEEL, both for steel tubes.	Alpha Indus., Inc. v. Alpha Steel Tubes & Shapes, Inc., 205 USPQ 981 (9th Cir. 1980)
PLUS v. MEAT PLUS, both for pet foods.	Plus Prods. V. Star-Kist Foods, Inc., 220 USPQ 541, 544 (TTAB 1983)
MAGIC v. SOUR MAGIC, both for mixes.	Basic Vegetable Prods. Inc. v. General Foods Corp., 165 USPQ 781, 784 (TTAB 1970)
EASY v. EASYTINT, both for paints.	Murray Corp. of America v. Red Spot Paint and Varnish Co., 126 USPQ 390 (CCPA 1960)
KEYCHECK, KEYBANKER v. KEY, all for financial services.	In re Hamilton Bank, 222 USPQ 174 (TTAB 1984)
OOZ BALL v. OOZE, both for novelty compounds.	Monarch Licensing, Ltd. V. Ritam Int'l Ltd., 24 USPQ2d 1456, 1461 (S.D.N.Y. 1992)
CONDITION v. CURL & CONDITION, both for hair care products.	Redken Labs, Inc. v. Clairol Inc., 183 USPQ 84 (9th Cir. 1974).

In the present case, the issue is not whether there is likelihood of confusion between ROYALE and ROYAL, but whether there is likelihood of confusion between different marks, ROYALE and ROYAL CARGO, for different goods. Leaving aside the differences in the goods, the Trademark Office has consistently found no likelihood of confusion between the mark ROYALE and a ROYAL combination mark where the second word is weak for identical goods and services as illustrated by the following marks (Exhibit C to the Request for Reconsideration):

ROYALE	ROYAL Combination Mark
ROYALE, Reg. No. 2,717,038, for restaurant services	ROYAL HAWAIIAN, Reg. No. 831,216; ROYAL FORK, Reg. No. 1,006,526; ROYAL DONUT, Reg. No. 1,093,444; CAFE ROYAL, Reg. No. 1,515,900; ROYAL TREAT, Reg. No. 1,763,411; ROYAL CHOPSTIX, Reg. No. 2,210,456; ROYAL THAI CAFE, Ser. No. 78/416,472; all for restaurant services
ROYALE, Reg. No. 2,259,712, for meats	ROYAL SMOKE, Reg. No. 2,584,608; ROYAL OVEN, Reg. No. 1,943,132; ROYAL TREAT, Reg. No. 1,662,623; ROYAL PANTRY, Reg. No. 992,251; ROYAL RIBS, Reg. No. 903,121; all for meats
ROYALE, Reg. No. 360,030, for playing cards	ROYAL FLUSH, Reg. No. 3,115,117, for playing cards
ROYALE, Reg. No. 988,749, for pans	ROYAL COOK, Reg. No. 2,005,463, for pans
ROYALE, Reg. No. 979,759, for aluminum foil	ROYAL CHEF, Reg. No. 897,211, for aluminum foil
ROYALE, Reg. No. 1,197,928, for kitchen cabinets	ROYAL BIRCH, Reg. No. 748,457, for cabinets
ROYALE, Reg. No. 1,219,740, for razor blades	ROYAL CROWN, Reg. No. 255,083, for razor blades

ROYALE	ROYAL Combination Mark
ROYALE, Reg. No. 1,233,477, for bicycles	ROYAL FLYER, Reg. No. 545,154, for bicycles
ROYALE, Reg. No. 1,349,470, for towels	ROYALCOVER, Reg. No. 3,151,143, for towels ROYAL TERRY, Reg. No. 1,839,464, for towels
ROYALE, Reg. No. 1,321,039, for cookies	ROYAL DANSK, Reg. No. 1,259,572, for cookies ROYAL NUGGETS, Reg. No. 1,532,265, for cookies
ROYALE, Reg. No. 1,435,320, for video cassette tapes	ROYAL SOUND, Reg. No. 1,450,432, for video tape cassettes
ROYALE, Reg. No. 1,336,993, for shortening	ROYAL GUEST, Reg. No. 1,316,415, for shortening
ROYALÉ, Reg. No. 1,360,438, for watches	LADY ROYAL, Reg. No. 922,792, for watches
ROYALE, Reg. No. 1,212,386, for toilet paper, paper towels	ROYAL TRAVELLER, Reg. No. 1,884,876, for paper toilet seat covers ROYAL GUEST, Reg. No. 1,316,415, for paper towels
ROYALE, Reg. No. 1,775,400, for peppers	ROYAL BLUE, Reg. No. 1,184,051, for peppers
ROYALE, Reg. No. 1,822,623, for strollers	THE ROYAL NURSERY, Reg. No. 1,950,535, for strollers
ROYALE, Reg. No. 2,934,552, for thread	BABY ROYAL BR, Reg. No. 2,878,213, for thread

ROYALE	ROYAL Combination Mark
ROYALE, Reg. No. 1,813,765, for soap dishes	ROYAL WINTON, Reg. No. 2,396,749, for soap dishes ROYAL MANOR, Reg. No. 1,954,047, for soap dishes

Please appreciate that some of the registrations in the charts set forth above are canceled or have expired. However, at one time they coexisted without likelihood of confusion being found by the Trademark Office.

Considering the weakness of applicant's mark and the fact that the marks do not have similarity in sound, appearance or connotation when viewed in their entireties, it is respectfully contended that confusion is not likely and probably not even possible.

3. The Goods Are Specifically Different And Are Not Sold Through the Same Channels of Trade

Initially, the examining attorney took the position that the goods are related because they are "in the nature of vehicles." The examining attorney argues that the registrations attached to the official action of May 1, 2006, are probative to the extent that they serve to suggest that the goods listed therein, namely trailers, are of a kind that may emanate from a single source. There is no evidence that the goods are sold through the same channels of trade.

Among the registrations cited in support of the examining attorney's position are Reg. Nos. 2,868,182, 2,793,378 and 2,394,684, each covering automobiles, trucks and cargo trailers. Yet, the Trademark Office found no

likelihood of confusion between the mark ROYAL CARGO for cargo trailers and the mark ROYALE of General Motors for automobiles, Reg. No. 1,562,070, and the mark ROYALE for truck bodies, Reg. No. 2,140,117. Therefore, the Trademark Office on a number of occasions has found that these goods are not sufficiently related to cause confusion, particularly when the marks are different, even though all goods can be found in certain registrations. In fact, the Trademark Office did not even find likelihood of confusion between the two withdrawn registrations, one covering the mark ROYALE for automobiles and the other covering the mark ROYAL for truck bodies.

Product relatedness is a matter of degree, Munters Corp. v. Matsui America, Inc., 14 USPQ2d 1993, 2000 (N.D. Ill. 1989). The degree to which consumers are likely to be confused as between products themselves is a function of the competitive proximity of the products. Lambda Electronics Corp. v. Lambda Technology, Inc., 211 USPQ 75, 86 (S.D.N.Y. 1981). There is no evidence to suggest that a consumer purchasing a folding camping trailer will be familiar with various marks used on the goods in the cited registration and, based upon that familiarity, will assume that the folding camping trailer is in some way related to these goods. The goods are not used for the same purpose; they are not substitutes for each other.

The case of Champagne Louis Roederer S.A. v. Delicato Vineyards, 47 USPQ2d 1459 (Fed. Cir. 1998), is very illuminating in its discussion in the concurring opinion as to the necessity of supplying a synthesis to the likelihood of confusion analysis. It is not enough to simply state that "the registrants offer

very similar goods in the nature of vehicles." Rather, the examining attorney must state how the similarity between folding camping trailers and these other goods will lead to a likelihood of confusion, not just a possibility of confusion, when identified by different weak marks.

4. The Goods Involved Are Not Impulse Items

A folding camping trailer and the goods in the cited registration are used for entirely different purposes. One is used by humans; one is used for cargo. The goods obviously are not casually purchased off the shelf. The goods are designed to serve specific needs and will be purchased to satisfy those needs. The purchase of these items will be made by careful, sophisticated purchasers.

SUMMARY

The inescapable conclusion is that the words "ROYAL" and "ROYALE" are weak; and further the mark ROYAL CARGO is weak. The marks ROYALE and ROYAL CARGO are different in sound, appearance and connotation. When these differences are combined with differences in the goods and purposes of the goods, there is no likelihood confusion. Where a portion is weak, even minor differences between the marks and goods will suffice to enable consumers to differentiate between them.

It seems highly improbable that a consumer, upon seeing applicant's mark, will conclude that it has some connection with the owner of the mark ROYAL CARGO, a company which offers no vehicles for personal

transportation, but rather offers only vehicles for transporting cargo, simply because applicant's mark has some alleged similarity to one portion of registrant's mark. It is clear that confusion is not probable and certainly not likely.

It goes without saying that the test is likelihood of confusion, not possibility of confusion. It has been said that likelihood of confusion is synonymous with "probable confusion"; mere possibility of confusion is not enough. See McCarthy on Trademarks, § 23.01[3][a].

For the above reasons, it is respectfully requested that the refusal to register applicant's mark be reversed.

Respectfully submitted,

ALSTON & BIRD LLP

By: Edward M. Prince
Edward M. Prince

The Atlantic Building
950 F Street, N.W.
Washington, D.C. 20004-1404
(202) 756-3358
Fax: (202) 756-3333